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84-1851
No. A-800

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1984

EDGAR HARDIN GILLOCK,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Sixth Circuit's finding of misjoinder requires reversal of defendant Gillock's conviction.

(2) Whether the Sixth Circuit's decision in the case before this court can be reconciled with the Eighth Circuit's ruling in United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979) and, if not, which ruling is correct.

(3) Whether reversal of a conspiracy conviction due to a fatal variance between the indictment and the proof offered at trial requires reversal of remaining convictions which were based in large part on alleged co-conspirators' hearsay statements erroneously admitted under FRE 801(d)(2)(E).

B. PARTIES TO THE PROCEEDING

At trial, W. Hickman Ewing, United States Attorney, and Michael C. Speros, Assistant United States Attorney, represented the United States of America. Mr. Ewing and Mr. Speros also represented the government on appeal.

At trial, James D. Causey served as lead defense counsel for Edgar H. Gillock. Jay Fred Friedman served as associate defense counsel. Mr. Causey and Mr. Friedman represented Mr. Gillock through the appeal to the Court of Appeals for the Sixth Circuit with Mr. Friedman serving as lead counsel.

Both at trial and on appeal, Henry L. Klein represented co-defendant, Allan Harvey Bibby. Mr. Klein has filed a Petition for Writ of Certiorari on Mr. Bibby's behalf.

At trial, William L. Harper and Edwin L. Hoffman represented co-defendant, A.

Arthur Ayers. On appeal to the Sixth Circuit, Andrew J. Ekonomou and Kirby G. Atkinson represented Mr. Ayers.

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has been published in the Federal Reporter, 2d Series, styled United States v. Bibby, et al, 752 F.2d 1116 (6th Cir. 1985).

E. JURISDICTIONAL STATEMENT

(1) The judgment sought to be reviewed was decided and filed January 14, 1985.

(2) The Court of Appeals for the Sixth Circuit denied Gillock's petition for rehearing en banc by order dated March 1, 1985. By order dated April 22, 1985, Justice O'Connor granted an extension of time within which to petition for certiorari, to and including May 30, 1985.

(3) The petitioner anticipates no cross-petition for certiorari.

(4) The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

F. RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

(1) 18 U.S.C. §2 - reprinted as Appendix C

(2) 18 U.S.C. §371 - reprinted as Appendix D

(3) 18 U.S.C. §1341 - reprinted as Appendix E

(4) 18 U.S.C. §1343 - reprinted as Appendix F

(5) 18 U.S.C. §1951 - reprinted as Appendix G

(6) 26 U.S.C. §7201 - reprinted as Appendix H

(7) Federal Rules of Criminal Procedure 8 - reprinted as Appendix I

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(10) Federal Rules of Evidence 611(a) - reprinted as Appendix L

(11) Federal Rules of Evidence 801 (d)(2)(E) - reprinted as Appendix M

G. STATEMENT OF THE CASE

Defendant Edgar Gillock is a former Tennessee State Senator who was serving in the Legislature at the time of trial. In addition to his part-time duties as a legislator, defendant Gillock practiced law in Memphis, Tennessee.

Defendant Allan Bibby is a former employee of Honeywell Information Systems, Inc. At all times pertinent to this prosecution, he served as vice president of Honeywell's operations in the northern region of the United States which included Memphis and Nashville.

Defendant Arthur Ayers is also a former Honeywell employee. Until June 30, 1981, he served as financing marketing manager for the company's southern region. Both Ayers and Bibby were based in Honeywell's Atlanta office.

From 1975 until June of 1977, unindicted co-conspirator Jack Owen served as manager for the midsouth branch of Honeywell's operations. Both Memphis and Nashville were included with the midsouth branch's territory. From July of 1977 until July of 1978 when defendant Bibby terminated him for failure to adequately keep expense reports, Owen served as Honeywell's district director. The southeast district did not include Memphis and Nashville.

Unindicted co-conspirator Robert Grapp is a former Honeywell employee who left the company and formed Public Systems Incorporated, a computer consultant to state and local governments. Grapp was convicted of conspiracy and fraud in an unrelated case prior to this trial.

Unindicted co-conspirator Oliver Drew served as a Honeywell sales repre-

sentative in the Memphis area from January of 1975 until December of 1977 when he was promoted to the position of senior marketing representative and public sector marketing manager.

Unindicted co-conspirator Jack Joseph Camarda is a former Honeywell employee who left the company in August of 1976 to form Financial Marketing Services. Financial Marketing Services was an Atlanta based company offering third-party financing to prospective purchasers of computer equipment.

At issue at trial was the role played by defendant Gillock in two (2) government contracts secured by Honeywell in Tennessee.

In 1976, the State of Tennessee purchased from Honeywell a computer system to service the Department of Employment Security. The State made the purchase

through its competitive bidding procedure which entails review by a legislative committee. Defendant Gillock exercised no authority over the choice of bids nor did he sit on the legislative committee which oversaw the bidding process.

In 1978, Shelby County purchased a package from Honeywell to update the county's computer system installed in 1975 and also purchased from Honeywell. The county financed this purchase through Financial Marketing Services. The County's governing body, the Quarterly Court, approved the purchase and financing arrangements. Again, defendant Gillock exercised no authority in the decision to purchase additional Honeywell equipment.

In the case before this Court, the twenty (20) count indictment, dated June 24, 1982, named three (3) defendants, Edgar Hardin Gillock, A. Arthur Ayers, and Allan

Harvey Bibby. Count I of the Indictment listed twenty-five (25) factual allegations. Section B of Count I charged the three (3) defendants with conspiracy to commit offenses against the United States, specifically with conspiracy to violate 18 U.S.C. §§1341 and 1343. The conspiracy charge stemmed from an alleged violation of 18 U.S.C. §371. According to Section C of Count I, the three (3) defendants and unnamed co-conspirators agreed "to profit financially by defrauding Honeywell Information Systems, Inc. of the corporation's right to the honest, loyal and faithful performance of its employees' services." Defendants Ayers and Bibby and other co-conspirators employed by Honeywell allegedly used their positions within the corporation to divert Honeywell funds through third-party companies to themselves and persons outside Honeywell, including

defendant Gillock. Section C further alleged that defendant Gillock would use his official position and influence as a state senator to obtain contracts for Honeywell with Shelby County, Tennessee, and the State of Tennessee. Section D of the indictment listed eighty-seven (87) overt acts allegedly committed by the three (3) defendants and unnamed co-conspirators in furtherance of the conspiracy.

Count II of the indictment charged the three (3) defendants with the violation of 18 U.S.C. §§1341 and 2. In furtherance of the alleged scheme to defraud Honeywell, the State of Tennessee and its citizens, and the County of Shelby and its citizens, the three (3) defendants allegedly caused a three thousand dollar ($3,000.00) check to be delivered by the United States Postal Service from ManMark, Inc. in Dallas, Texas to defendant Gillock in Memphis, Tennessee.

Count II listed sixteen (16) factual allegations in support of this mail fraud and aiding and abetting charge. Counts III, IV, V, VII, and VIII charged the three (3) defendants with five (5) separate violations of 18 U.S.C. §§1341 and 2 for allegedly causing five (5) checks for three thousand dollars ($3,000.00) each to be delivered on five (5) separate occasions by the United States Postal Service from ManMark, Inc. in Dallas, Texas, to defendant Gillock in Memphis, Tennessee.

Count VI of the indictment charged the three (3) defendants with the violation of 18 U.S.C. §§1343 and 2. In furtherance of the alleged scheme to defraud, the three (3) defendants allegedly caused a telephone conversation to be transmitted in interstate commerce between unindicted co-conspirator, Jack Camarda, in Atlanta, Georgia, and de-

fendant Gillock in Memphis, Tennessee, on August 29, 1978. Count IX charged the three (3) defendants with a second violation of 18 U.S.C. §§1343 and 2 by causing a telephone conversation to be transmitted in interstate commerce between defendant Gillock in Memphis, Tennessee, and unindicted co-conspirator, Oliver Drew, in Atlanta, Georgia, on October 19, 1978.

Counts X, XI, XII, XIII, XIV, XV, and XVI charged defendant Gillock with seven (7) separate violations of 18 U.S.C. §1951. Count XVI, in particular, accused defendant Gillock of knowingly and willfully attempting to affect commerce by extortion by attempting to obtain and by attaining property from Honeywell employees in the amount of $130,365.61. Defendant Gillock allegedly obtained the monies by wrongfully inducing the Honeywell employees' consent

under color of his official right as a state senator.

Counts XVII, XVIII, XIX and XX of the indictment charged defendant Gillock with various violations of Title 26 of the United States Code. Count XVII specifically accused defendant Gillock of willfully and knowingly attempting to evade federal income taxes due for 1978 in violation of Title 26 U.S.C. §7201. Defendant Gillock allegedly filed a false income tax return listing taxable income as $37,266.00 and tax due as $7,630.00 when he allegedly knew that his income for 1978 totalled approximately $168,390.61 with a income tax due of $63,100.00.

On June 30, 1982, defendant Gillock pled not guilty to the charges.

Counsel for defendant Gillock filed various motions and a request on his behalf on

July 29, 1982. The following motions bear upon the Questions Presented for Review: (1) a motion for preliminary independent determination of the admissibility of alleged co-conspirators' statements and order for structuring proof which was denied in a hearing held September 10th; (2) a motion to require the government to give notice of hearsay sought to be introduced which was denied in the September 10th hearing; (3) a motion for severance from co-defendants which was overruled on August 5, 1982; (4) a motion for separate trial on Counts XVII through XX which was denied in the September 10th hearing.

Jury trial in the case before this Court began on October 12, 1982, with District Judge Robert McRae presiding.

On November 10, 1982, the jury returned a verdict of guilty as to Counts I, II, III, IV, V, VI, VII, VIII, IX, XVI and XVII and not

guilty as to Counts XVIII, XIX and XX. The jury declared a mistrial as to Counts X, XI, XII, XIII, XIV and XV.

Counsel for defendant Gillock filed a notice of appeal on November 19, 1982.

On December 13, 1982, the Court held a sentencing hearing. It handed down a sentence of four (4) years to run concurrently on Counts I, II, III, IV, V, VI, VII, VIII, IX and XVI, plus a sentence of three (3) years to run consecutively on Count XVII. The Court also imposed a $10,000.00 fine and dismissed Counts X, XI, XIII, XIV and XV.

The Court of Appeals consolidated the appeals of Gillock, Ayers and Bibby. After briefing and oral arguments, the Sixth Circuit remanded the case to the district court to make the necessary findings under United States v. Enright, 579 F.2d 980 (6th Cir. 1978). After a hearing, District Judge Robert McRae entered an order finding that all co-

conspirator hearsay evidence was properly admitted under Enright.

In an opinion dated January 14, 1985, the Court of Appeals reversed Gillock's conspiracy conviction and one wire fraud conviction. His sentence remained unchanged.

H. ARGUMENT

According to Rule 17 of the Rules of the United States Supreme Court, the following list indicates the character of reasons that will be considered in granting a review on certiorari:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in con-

flict with applicable decisions of this Court.

The petitioner respectfully insists that the case before this Court satisfies the requirements of subsections (a) and (c) in the following three respects.

(1) Misjoinder in the case before this Court requires reversal of defendant Gillock's convictions.

(a) Joinder of offenses. -

Rule 8(a) of the Federal Rules of Criminal Procedure provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Under Rule 8(a), joinder of offenses is permissive only. United States v. Rabbitt, 583 F.2d 1014, 1021 (8th Cir. 1978), cert.

denied, 439 U.S. 1116 (1979).

The Court of Appeals in the case before this Court determined that Counts XVIII through XX were improperly joined under Rule 8(a) with the remaining counts. Opinion at 7. The Court, however, determined that the misjoinder constituted harmless error. Opinion at 7-8.

Rule 8(a) authorizes joinder of offenses against a defendant if one of three tests is met. First, offenses may be joined if they are based on the "same act or transaction". Second, offenses may be joined if they are grounded on "two or more acts or transactions connected together or constituting part of a common scheme or plan". Third, offenses may be joined if they are "of the same or similar character". 1 C. Wright, Federal Practice and Procedure §143 (1982).

Application of Rule 8(a) involves the balancing of two conflicting interests; efficiency in the operation of the federal

judicial system versus the right of an accused to a fair trial free of substantial prejudice to that right caused by the joinder of offenses. Cataneo v. United States, 167 F.2d 820, 823 (4th Cir. 1948).

Joinder of the counts exposed defendant Gillock to a great risk of prejudice to his right to a fair trial. The evidence presented by the Government at trial was confusing and complex. As the Seventh Circuit remarked in United States v. Quinn, the jury in a complex and confusing case faces a difficult task in separating proof relevant to different counts. 365 F.2d 256, 265-266 (7th Cir. 1966).

(b) Joinder of defendants.-

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense

> or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

In the case before this Court, the Court of Appeals found that Counts XVIII through XX were improperly joined as to Bibby and Ayers under Rule 8(b). Although the Court of Appeals reversed Gillock's conspiracy conviction, it did not address his claim of misjoinder under Rule 8(b).

Rule 8(b) allows joinder of defendants if the defendants allegedly participated in (1) "the same act or transaction constituting an offense or offenses" or (2) "the same series of acts or transactions constituting an offense or offenses." 1 C. Wright, Federal Practice and Procedure §144 (1982).

Rule 8(b) does not define what is meant by the phrase "the same series of acts or transactions". The various circuits have defined the phrase in various ways. Accord-

ing to the Fourth Circuit, the phrase includes transactions connected in time, place, and manner so as to constitute a common scheme or plan. United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979). The Seventh Circuit has defined the test as the existence of a common plan which in turn depends on factors such as whether the transactions occur in the same place within a short time period and utilizing the same modus operandi. United States v. Scott, 413 F.2d 932, 935 (7th Cir. 1969), cert. denied, 396 U.S. 1006 (1970). The case at bar involved unrelated transactions differing in time, place and manner.

The First Circuit defines the term "series" in relation to the benefits derived from joinder:

> Rule 8(b) is not limited to situations in which proof of the other criminal transaction would be

> admissible in a separate trial. It goes beyond, to others, the excuse being the benefit to the court. But to offset the prejudice where multiple defendants are being joined even though they did not engage in a joint act, such as conspiracy, . . . this possibility of benefit should explicitly appear from the indictment or from other representations by the government before trial. Classic examples of such a benefit are when there is an overlapping of issues, as, for example, when some defendants are charged with transporting stolen goods in interstate commerce, and others are charged with receiving the goods, so stolen and transported . . . or when defendants are charged with conspiracy to conceal a crime that part of their number are charged with committing. * * * Where, however, there are no presumptive benefits from joint proof of facts relevant to all the acts or transactions, there is no "series," Rule 8(b) comes to an end, and joinder is impermissible. (citations and footnote omitted).

King v. United States, 355 F.2d 700, 704 (1st Cir. 1966). The Fifth Circuit has held that a "substantial identity of facts or participants" satisfies the "series" requirement of Rule 8(b). See, e.g., United States v. Welch, 656 F.2d 1039, 1049 (5th Cir. 1981),

cert. denied, 456 U.S. 915 (1982). In the instant case, the facts as well as the participants varied from transaction to transaction.

In addition to the confusion surrounding the "series" requirement. Rule 8(b) does not expressly state to what extent each defendant must have "participated" in the series of acts. 1 C. Wright, Federal Practice and Procedure §144 (1982). In the Eighth Circuit's estimation, acts must be part of one overall plan about which all defendants knew and in which all defendants participated in order to be part of the "same series of acts or transactions". United States v. Bledsoe, 674 F.2d 647, 656 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1982).

According to the Ninth Circuit, the Government may not escape Rule 8(b)'s requirement merely by adding a conspiracy count

to link the defendants together. Rather, the Government must put forth the conspiracy charge in good faith. United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971). In Williamson v. United States, the Ninth Circuit noted that the Government cannot join factually unrelated charges against some but not all of the defendants simply because the indictment charges all of the defendants with conspiracy in another count. 310 F.2d 192, 197 n. 16 (9th Cir. 1962). The instant case is a good illustration of this type of improper joinder.

The Government cannot join separate and distinct conspiracies and prosecute them as a single conspiracy. 1 C. Wright, Federal Practice and Procedure §144 (1982). The Fourth Circuit in United States v. Goss, determined that where an indictment charged one conspiracy but the evidence showed a series of separate, unconnected conspiracies,

the variance required the convictions to be set aside. In the Goss case, the episodes shown were far apart and involved different people. 329 F.2d 180, 182-83 (4th Cir. 1964). As the Court of Appeals acknoweldged, the Government proved, in the case at bar, several unrelated transactions, rather than one (1) overall conspiracy involving Edgar Gillock.

(c) The appropriate remedy for misjoinder.

Prior to the case before this Court, the Sixth Circuit addressed the question of the appropriate remedy where joinder is improper. In the case of United States v. Hatcher, the Sixth Circuit determined that the trial court has no discretion to deny a motion for severance where there has been misjoinder. 680 F.2d 438, 441-42 (6th Cir. 1982).

The Sixth Circuit panel opinion in the

case before this Court concluded that the misjoinder of Counts XVIII-XX was harmless error. In support of its ruling, the panel reviewed several cases decided under Rules 8 and 14 of the Federal Rules of Criminal Procedure.

In United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982), the Eleventh Circuit addressed severance issues in the context of tax counts and non-tax counts joined as part of a series of acts or transactions arising from the conspiracy and criminal enterprise charged in the indictments and established at trial. The appellate court approved of the joinder because the tax offenses were part of a series of acts committed in furtherance of the conspiracy. The Court noted that misjoinder is inherently prejudicial and that severance for misjoinder is mandatory. Id. at 1314.

Again, in United States v. Kenny, 645

F.2d 1323 (9th Cir.), cert. denied, 454 U.S. 828 (1981), the Court addressed severance issues in the context of an accompanying conviction for conspiracy which the Court upheld. Id. at 1344-46.

As the panel notes, the remedy for misjoinder under Rule 8 has traditionally been automatic reversal. Opinion at 7 citing United States v. Reynolds, 489 F.2d 4, 6 (6th Cir. 1973), cert. denied, 416 U.S. 988 (1974) and Ingram v. United States, 272 F.2d 567, 570 (4th Cir. 1959).

The panel opinion cites three cases in support of the proposition that misjoinder may constitute harmless error and, therefore, in limited circumstances, misjoinder may not require reveral. Opinion at 7. The Second Circuit in United States v. Halper, 590 F.2d 422 (2nd Cir. 1979), acknowledged that there are cases in which the courts have found misjoinder to be harmless error. However,

the Second Circuit stated, "[W]e can find errors such as these harmless only if 'our conviction is sure that the error did not influence the jury or had but very slight effect.'" Id. at 432-33, citing United States v. Quinto, 582 F.2d 224, 235 (2d Cir. 1978). The Second Circuit could not draw the conclusion in the Halper case and reversed and remanded the case for new and separate trials. Id.

While the appellate court in United States v. Martin, 567 F.2d 849 (9th Cir. 1977), determined that joinder was improper, it concluded that the error was harmless. The Court reviewed and upheld convictions for conspiring in various drug related offenses. Among the considerations weighing in favor of harmless error was the preponderance of overwhelming evidence introduced at trial concerning joint activity and involvement in a drug ring.

The Sixth Circuit reversed and remanded a conviction due in part to misjoinder in United States v. Hatcher, 680 F.2d 438 (6th Cir. 1982). The Sixth Circuit stated, "When misjoinder occurs severance is mandatory and failure to sever is error." Id. at 442. Only by application of Rule 52 of the Federal Rules of Criminal Procedure could the Sixth Circuit take cognizance of the government's argument that the improperly joined defendant suffered no prejudice. In a tentative, cautious treatment of the harmless error rule, the Sixth Circuit mentioned an instance in which the rule could apply to misjoinder: when evidence of the improperly joined offense would have been admissible to prove properly joined offenses. Prejudice results if the extent of proof of the improperly joined offenses is greater than the proof used to show other crimes or if the improperly joined offenses shifts the focus of the trial away from the properly joined

offense. Id.

In United States v. Goldfarb, 643 F.2d 422 (6th Cir.), cert. denied, 454 U.S. 827 (1981), the district court denied severance under Rule 14 of a corporate defendant from individual co-defendants. The corporate defendant argued that it could not defend itself except through the co-defendants who were its alleged agent and they, in turn, had countervailing Fifth Amendment rights. The Sixth Circuit rejected the argument because the corporate defendant did not call other officers, agents, and employees who were not defendants, yet participated in the conspiracy, to testify in its behalf. Id. at 435. Thus, the corporate defendant did not carry its burden by establishing abuse of discretion by the trial court.

In the appeal to the Sixth Circuit, counsel for Gillock assigned as error misjoinder of defendants and misjoinder

of offenses. Reversal of Gillock's conspiracy conviction illustrates the danger of joining numerous defendants and offenses together connected by an alleged conspiracy. The government failed to link Gillock to the conspiracy alleged in the indictment; however, hearsay testimony of co-conspirators and the cumulative effect of offenses alleged undoubtedly contributed to, and were responsible for, the remaining convictions. Neither the Halper case nor the Hatcher case advocates widespread application of the harmless error rule in instances of misjoinder. The panel opinion, in effect, changed the rule long recognized in the Sixth Circuit.

The issue of appropriate remedy for misjoinder is currently before the Supreme Court in the case of United States v. Lane, NO. 84-744. The Court of Appeals' decision may be found at United States v. Lane, 735

F.2d 799 (5th Cir. 1984). In contrast to the Sixth Circuit, the Fifth Circuit has held that misjoinder always requires reversal of a conviction. The First, Third, Eighth, Tenth and Eleventh Circuits join the Fifth. The Second, Fourth, Seventh, Ninth and D.C. Circuits side with the Sixth Circuit on the issue of the proper remedy for misjoinder.

(2) The Sixth Circuit's decision in the case before this Court conflicts with the Eighth Circuit's ruling in United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979).

At trial and on appeal, counsel for defendant Gillock relied on the case of United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979), in support of reversal of Gillock's Hobbs Act, mail fraud, and wire fraud convictions.

(a) The mail and wire fraud con-

victions.-

Section 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Section 1343 echoes Section 1341 in all material respects.

In the case at bar, the Government presented no evidence to support the contention that defendant Gillock participated

in a scheme to defraud Honeywell or aided and abetted such a scheme.

In United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 479 U.S. 1116 (1979), the Court addressed factual circumstances almost identical to the facts in the case before this Court.

In the Rabbitt case, the indictment charged the defendant with a violation of various federal laws, including 18 U.S.C. §1341. The defendant, Robert Rabbitt, was an attorney and a long time member of the Missouri House of Representatives, who held the position of floor leader for five years and was Speaker of the Missouri House of Representatives during the time various offenses charged allegedly occurred. He offered, for a ten percent (10%) fee from any resulting work, to introduce an architectural firm to people in state and local government who might be able to secure contracts for the firm. When the firm

succeeded in obtaining projects, it reimbursed the defendant for his assistance in the form of retainer fees to the defendant's law firm. The mailings of law firm retainer bills and checks in payment constituted the mail fraud charges against the defendant. Id. at 1020-21.

At page 1024 of the Rabbitt decision, the Eighth Circuit held:

> The concept of fraud upon the public may clearly fall within the ambit of the mail fraud statute where dishonest conduct by a public official directly implicates the functions and duties of that official's public office. Whether a showing of dishonesty on the part of a state official, outside his official duties, with no financial loss to the state constitutes a fraud upon the public and thereby is statutory mail fraud is, in our judgment, highly questionable. Every breach of public trust and malfeasance in office in connection with which some mailing has occurred does not and cannot fall within the confines of the mail fraud statute.

The Court at page 1025 stated as follows:

> The indictment charges, in essence, that Rabbitt defrauded the citizens of Missouri by accepting a ten percent commission on architectural contracts awarded to the Berger-Field firm and concealing or failing to disclose his interest in those contracts.

The Court noted that this conduct may be unethical, and in violation of canons as an attorney. In addition, such conduct may violate a candidate disclosure statute or violate a state statute as to partiality or abuse by a public official. However, the Court stated:

> But such violations, although bearing on intent to defraud, do not in and of themselves establish the substantive crime of mail fraud under 18 U.S.C. §1341.

Although in several cases, the courts relied on various combinations to establish a scheme to defraud, the Eighth Circuit distinguished these cases on the basis that they involved conduct which deprived the public of potential tangible gain, or of its

right to honest and fair dealing by the officer in question, or of its right to disclosure of the officer's interest in the transaction. Id. at 1025.

> We find none of these factors present in this case. The state officials who awarded architectural contracts did so on merit. There is no evidence that Rabbitt's use of his friendship, position, and influence to aid Berger-Field in obtaining contracts resulted in inferior work, greater expense, or any other tangible loss to the citizens or state.
>
> We also find no evidence that Rabbitt's conduct deprived the citizens of their right to honesty and fairness in the conduct of his official duties. Rabbitt did not, in his official capacity, control the awarding of state contracts to architects. There is no evidence that Rabbitt failed to carry out the duties and responsibilities of his legislative office or leadership positions for the sake of Berger-Field. Id. at 1026.

The Court went on further to say:

> To affirm the convictions on the Berger-Field mail fraud counts would mean expansion of the statute beyond its application in prior political

> corruption cases. This we refuse to do. We hold that Rabbitt's motion for judgment of acquittal on mail fraud counts I through X should have been granted. Accordingly, we reverse his convictions on those counts.

Subsequent to the Rabbitt case, the United States Court of Appeals for the Second Circuit in the case of United States v. Von Barta, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981) faced a similar situation. The Second Circuit acknowledged that the mail fraud statute encompasses schemes to deprive an employer of an employee's honest and faithful services provided the employee is under a duty to reveal material information. The Court made the following observation:

> Similarly, in United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979), the Eighth Circuit reversed the mail fraud conviction of a state legislator who aided an architectural firm in obtaining state contracts. Rabbitt's reward for his services was

> a commission of ten percent based on the work he diverted to the firm. Although Rabbitt violated the canons of legal ethics, a statute requiring candidates for state office to disclose their sources of income, and possibly a state provision outlawing 'partiality' or abuse of public office, his unscrupulous conduct was held not to violate §1341. Significantly, one reason was that Rabbitt, as a state official, was under no affirmative duty to disclose his interest in the firm.

Id. at 1006.

In the instant case, testimony at trial proved that both the State and County received good deals on their Honeywell purchases and that Honeywell benefited also.

(b) The Hobbs Act conviction.-

Section 1951 provides as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years

or both.

(b) As used in this section -

(2) The term "extortion" means the obtaining or property from another, with his consent induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such state; and all other commerce over which the United States has jurisdiction.

In the Rabbitt decision, the Eighth Circuit set aside the conviction of a state senator under one (1) count charging a violation of the Hobbs Act. The defendant in Rabbitt introduced an architectural firm to the Chief of Design and Construction for the State of Missouri, the State Director of Prisons, the State Director of Planning and

Construction, and a St. Louis alderman. In return, the firm paid the defendant a ten percent (10%) fee for projects received through the defendant's contacts. Id. at 1020.

The Eighth Circuit held:

> In the present case, the Government does not contend that Rabbitt possessed actual power to award contracts for architectural services within his legislative powers or that Rabbitt possessed the apparent power to award contracts and that Berger-Field believed in Rabbitt's power to secure contracts for the firm.

The evidence in Rabbitt, therefore, did not support the Government's argument. Id. at 1028.

The Government, in the case before this Court, did not allege in the indictment nor did the prosecution produce any witness who stated that he or she believed that defendant Gillock possessed the power to award contracts for computer or computer-related systems.

The Court stated at page 1028 of the Rabbitt decision:

> Each architect knew the most Rabbitt could do was recommend them to state contractors as qualified architects and thereby gain them a friendly ear. Moreover, while Rabbitt's influence obviously helped these architects obtain state jobs, no testimony established that any state contracting officer awarded any contract to Berger-Field because of Rabbitt's influence or that Berger-Field believed Rabbitt's introduction was enough to secure the work. The Government failed to prove Berger-Field entertained a reasonable belief Rabbitt possessed effective control over the award of architectural contracts necessary to establish extortion 'under color of official right' in violation of the Hobbs Act.

The indictment against Gillock is, in all material respects, identical with the Rabbitt case. Neither the indictment nor testimony at trial included any statement or allegation that any person or persons had any basis or reason to believe that the defendant Gillock had effective control over the award of computer contracts. There was no such

allegation; there was no testimony to that effect.

The Sixth Circuit panel relies upon United States v. Mazzei, 521 F.2d 639 (3d Cir.) (en banc), cert. denied, 423 U.S. 1014 (1975), in support of Gillock's Hobbs Act conviction. The Mazzei case, however, differs in several important respects from the case before this Court. In Mazzei, the secretary-treasurer of the corporate victim of the alleged extortion testified that he believed in the defendant's power over state leases. Id. 643. Furthermore, the evidence introduced at trial confirmed the defendant's "ability to initiate state inspection of the premises, to specify rental rates that would be and were acceptable to the state, and to alter [the corporation's] proposal on the second lease." Id. at 644. During negotiations, the defendant displayed intimate knowledge to the corporation's

secretary-treasurer of the decision making process in the granting of state leases. Id.

Although the Mazzei case is distinguishable, the Rabbitt opinion is directly on point in the case before this Court. The panel makes no attempt to reconcile its holding with the Rabbitt decision. As a result, conduct which is criminal under the Hobbs Act if committed in Tennessee, is not criminal in Missouri. The panel's decision, particularly in view of the conflict among the circuits, has potential far-reaching effects on the political process and those officials who participate in the process. Due to the conflict among the Circuits, the Supreme Court should grant certiorari on this issue as well as the issue of misjoinder already on certiorari.

(3) Reversal of the conspiracy conviction in the case before this Court re-

quires reversal of remaining convictions which were based, in large part, on hearsay statements erroneously admitted under FRE 801(d)(2)(E).

It has long been recognized that the statements of a co-conspirator made during the course of and in furtherance of a conspiracy are admissible against other alleged co-conspirators. This rule is embodied within the Federal Rules of Evidence at Rule 801(d)(2)(E) which provides that such statements are not hearsay and are, therefore, admissible. However, not all statements offered during a conspiracy trial are co-conspirators' statements. The trial court should evaluate proffered statements in order to separate admissible from inadmissible statements.

Rule 104 of the Federal Rules of Evidence requires the court to make a preliminary determination of the sufficiency of the

independent evidence before any co-conspirator statements are admitted into evidence. Since adoption of the Federal Rules of Evidence, many of the circuits have had an opportunity to re-evaluate the requisite elements necessary to admit a statement as that of a co-conspirator under Rule 801(d)(2)(E) and the standard of proof to be followed.

In United States v. Petrozziello, 548 F.2d 20, 22 (1st Cir. 1977), the First Circuit expressly held that the Federal Rules of Evidence require questions of admissibility to the resolved by the court. The First Circuit addressed the standard to be employed:

> The new rules, by eliminating the jury's role, place a greater burden on the judge, for his decision is now conclusive. In years past, this circuit has followed the general rule that a judge should admit hearsay against the defendant if the judge finds enough independent, non-hearsay evidence to make a prima facie case of conspiracy . . . This standard makes sense when the jury has the last word; the judge should

refuse to admit a co-conspirator's hearsay only when no reasonable jury could find that there was a conspiracy. But rule 104(a) requires that questions of admissibility be "determined" by the judge, and finding a prima facie case is not the same as "determining" that a conspiracy existed. A higher standard is implicit in the judge's new role.

Other changes in the rules also suggest a higher standard. The new rules permit a trial judge to base his "determination" on hearsay and other inadmissible evidence . . . Continued reliance on a prima facie standard will either broaden the co-conspirator exception unconscionably or plunge the courts into metaphysical speculation about how a prima facie case can be built on inadmissible evidence.

Although the prima facie standard is no longer appropriate, we see no reason to require that the conspiracy be provided beyond a reasonable doubt. That is the standard the jury will apply to the evidence as a whole. The judge is ruling on admissibility, not guilt or innocence; the government's burden need not be so great . . . The ordinary standard is sufficient; if it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy, the hearsay is

admissible.

548 F.2d at 23. [Citations and footnotes omitted.]

The Sixth Circuit followed suit in adopting the preponderance of evidence standard. In United States v. Enright, the court abandoned the prima facie rule and adopted the reasoning and holding of Petrozziello. 579 F.2d 980 (6th Cir. 1978). The court specifically discussed the question of whether Federal Rule of Evidence 104(a) or 104(b) governs the court's determination on the admissibility of co-conspirator statements. Noting that Rule 104 is ambiguous, the court concluded that "a fair reading of subsections (a) and (b) favors the construction that 104(a) should be applicable to the question of admissibility of a co-conspirator's statement. 579 F.2d at 984. After deciding that the determination must be made under Rule 104(a), the court held

that the issue for the trial judge's decision is more demanding than a prima facie test and calls for the exercise of judicial fact-finding responsibilities which require the trial judge to evaluate both credibility and the weight of the evidence. 579 F.2d at 985.

The court noted that retention of the prima facie standard under Rule 104(a) would unduly broaden the co-conspirator exception; moreover, the court held that a preponderance rather than a prima facie standard must be applied. 579 F.2d at 986.

The trial court, in the case before this Court, should have required independent proof of any co-conspirator's statement prior to its admission. A significant case dealing with this issue is the en banc decision of the Fifth Circuit in United States v. James, 590 F.2d 575 (5th Cir. 1979). The James court developed at great length the

importance of the trial court in making the admissibility determination and the standards that the court should follow. In addition, the court of appeals went further and outlined the preferred order of proof in cases involving alleged co-conspirator's statements.

Recognizing the inherent danger in the admission of hearsay in anticipation of a later showing of a conspiracy which never materializes, the court noted:

> The District Court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a co-conspirator. If it determines it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up.

590 F.2d 582.

Thus, the Fifth Circuit held that structured proof should be the rule ab-

sent a showing of impracticality.

In the instant case, the Government chose to prosecute only the three (3) named defendants despite the fact that the indictment referred to several alleged co-conspirators. If the Government intended to offer any statements of a co-conspirator which would otherwise be considered hearsay, the trial court should have ordered the Government to structure its proof to establish the necessary prerequisites to admissibility prior to the proffer of the statements themselves. The Fifth Circuit in James recognized the power and duty to enter such an order; furthermore, Federal Rule of Evidence 611(a) expressly sets forth this power and duty. Therefore, the trial court erred in its refusal to make a preliminary determination of the admissibility of the alleged co-conspirators' statements and its refusal to order the structuring of proof.

Because the trial court failed to make the required Enright determination, the Sixth Circuit remanded the case to the district court pursuant to United States v. Holloway, 731 F.2d 378 (6th Cir. 1984), for the lower court to make the finding. Although the district court purportedly made the Enright finding after a hearing, the panel opinion reversed Gillock's conspiracy conviction stating that the main conspiracy was "to defraud Honeywell of the honest, loyal, and faithful performance of its employees," with the core of the conspiracy the arrangement between Bibby, Ayers and Camarda. Opinion at 10.

Based on the trial court's erroneous finding that Gillock was a member of the conspiracy, the trial court admitted much hearsay evidence under Rule 801(d)(2)(E). For example, Grapp testified that Owen called stating that he needed to pay Gillock some

money. Owen further asked Grapp if Grapp would use his company, P.S.I., as a conduit for payments. Drew testified concerning alleged conversations with his Honeywell superiors on the Shelby County contract. Camarda testified that he, Bibby and Ayers agreed to pay Gillock $150,000.00 for his help with the Shelby County contract. According to Camarda, Drew or Ayers stated that Gillock's assistance was necessary to "unclog" the Shelby County transaction. Camarda testified that Drew told him who to make the $130,000.00 check to in payment of Gillock's alleged services.

Without this hearsay testimony, the government's case against Gillock on the remaining counts would have been considerably weakened, if not completely destroyed. As the panel opinion states:

> A substantial amount of evidence was introduced at trial detailing the Bibby/Ayers/Camarda profit-splitting arrangement, evidence that would not

> have been admissible in a separate trial on the Shelby County contract alone. Opinion at 11-12.

The jury heard evidence of multiple conspiracies not charged in the indictment.

Even though the panel reversed Gillock's conspiracy conviction, nevertheless, it permitted the admission of hearsay evidence to stand.

Not only did the district court fail to follow the proper procedure before admitting hearsay evidence, but, after the fact, the trial court erroneously entered a finding of conspiracy. Under the circumstances, the Court of Appeals should have reversed Gillock's convictions.

At any rate, the Supreme Court, pursuant to Rule 17, should grant certiorari on this issue to determine the appropriate remedy under such circumstances.

For the foregoing reasons, the de-

fendant respectfully requests this Court to grant his petition in this cause for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to hear and decide his case on oral argument and briefs.

Respectfully submitted,

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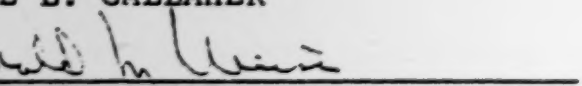
BY: 
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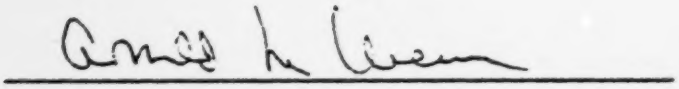
May, 1985

CERTIFICATE OF SERVICE

I, Arnold M. Weiss, Attorney for Petitioner, hereby certify that I have this 24 day of May, 1985, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon The Honorable W. Hickman Ewing, United States Attorney, Federal Building, Memphis, Tennessee 38103; Mr. Henry L. Klein, Attorney for Allen Bibby, 770 Estate, Memphis, Tennessee 38119; Mr. Andrew Ekonomou, Attorney for A. Arthur Ayers, Suite 515, Rhodes-Haverty Building, 134 Peachtree Street, N.W., Atlanta, Georgia 30303; and Mr. John Hehman, Clerk, United States Court of Appeals for the Sixth Circuit, U.S. Post Office and Courthouse Building, Cincinnati, Ohio 45202; Solicitor General, Department of Justice,

Washington, D.C. 20530; The Honorable Robert M. McRae, Judge, United States District Court for the Western District of Tennessee, 1107 Federal Building, 167 North Main Street, Memphis, Tennessee 38103; copies of the foregoing Petition for Writ of Certiorari filed by Edgar Hardin Gillock by placing copies of the same in the United States mail, properly addressed, and with sufficient postage affixed thereto.



84-1851

No. A-80

FILED
MAY 25 1985
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1984

EDGAR HARDIN GILLOCK,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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See, Sixth Circuit Rule 24

Nos. 82-5705, 82-5717, 82-5723

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALLAN HARVEY BIBBY (82-5705),
EDGAR HARDIN GILLOCK (82-5717),
A. ARTHUR AYERS (82-5723),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed January 14, 1985

Before: MARTIN, CONTIE, and WELLFORD, Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. Defendants Edgar Gillock, a former Tennessee state senator, and Arthur Ayers and Allan Bibby, former executives for Honeywell Information Systems, Inc., appeal their jury convictions for conspiracy, mail and wire fraud, extortion, and income tax fraud.

The charges against the defendants stem from their involvement in the sale of Honeywell computer systems. According to the indictment, the defendants were involved in a conspiracy to defraud Honeywell of both the honest and faith-

ful service of its employees and substantial sums of money. The illegal activity began sometime in the fall of 1975 when Oliver Drew and Jack Owen, two other Honeywell employees, first contacted Mr. Gillock. Drew and Owen needed Gillock's assistance to help them sell a new Honeywell computer to Tennessee's Department of Employment Security. According to Owen, Gillock was valuable because he introduced Honeywell officials to influential people in the Tennessee legislature and helped "get the paperwork to flow." According to Drew, Gillock was important because of his "political influence."

After the Department of Employment Security announced plans to purchase a Honeywell computer, Gillock approached Owen and suggested that he be compensated for his efforts on behalf of Honeywell. Owen told Gillock that there was no "vehicle" available through which to pay Gillock directly. The company had a policy prohibiting monetary payments to public officials. Nevertheless, Owen devised a scheme to pay Gillock indirectly through a Louisiana consulting firm, Public Systems, Inc. Public Systems was controlled by Robert Grapp, a former Honeywell employee. Owen paid Public Systems $4,045 in two installments for nonexistent services provided by Grapp. Grapp, in turn, sent the money to Gillock. The whole transaction took place with the knowledge and approval of Allan Bibby.

In the fall of 1976, the criminal enterprise entered a new stage. Bibby, Ayers, and Jack Comarda, another former employee who left Honeywell to start Financial Marketing Services, Inc., a company specializing in financing computer systems, concocted a plan to defraud Honeywell in transactions involving the sale of Honeywell computers financed by Camarda's company. The three agreed to a three-way split of profits realized on all sales financed by FMS in which Bibby and Ayers were involved in bringing Honeywell and FMS together. Because this arrangement was against Honeywell's conflict of interests policy, the three decided to conceal their

profits by funneling them through cattle ranching operations which each owned. As a result of this scheme, Camarda paid Bibby and Ayers approximately $600,000 each from twelve computer sales financed by FMS between 1976 and 1980.

One of the transactions that Bibby and Ayers received a kickback on involved a computer sale to Shelby County, Tennessee. Throughout the first quarter of 1978, Honeywell had attempted to sell Shelby County new computer equipment to upgrade a system originally purchased from Honeywell in 1975. After encountering little initial success, Honeywell officials decided to call on their government contact from the past, Mr. Gillock. Oliver Drew made the initial contact. At their meeting, Gillock assured Drew that he had "influence in Shelby County" and said he would be happy to offer his assistance. However, Gillock also said he would have to be paid for his troubles. Drew subsequently informed his superiors that Gillock wanted money.

On April 11, 1978, a meeting was held in Atlanta, Georgia, attended by Drew, Ayers, Gillock, possibly Bibby, and others, to discuss payment for Gillock. At that meeting, it was tentatively decided that Gillock would be paid ten percent of the contract price to Shelby County if and when the deal ever went through. Later, Bibby, Ayers, and Camarda had their own meeting and agreed that Gillock would be paid $150,000 out of their collective profit on the sale.

Bibby and Ayers also agreed that Gillock should be paid either a retainer fee or expense money while he worked on getting Shelby County to agree to upgrade its computer system. On April 26, 1978, Ayers called Jan Tyler, president and sole stockholder of Manmark, Inc., a Texas corporation, and asked him to mail Gillock $3,000 every month for six months. Because Tyler held the shares of Manmark in trust for Ayers, he did as Ayers requested. These six checks formed the basis of the mail fraud charges against Bibby, Ayers, and Gillock and all but one of the extortion charges against Gillock. Man-

mark was later reimbursed for the $18,000 by Financial Marketing Services, which was later reimbursed by Honeywell.

Shelby County finally bought the new computer equipment in October, 1978. On October 19, Camarda paid $130,365.61 to Gillock as his commission on the sale. This was less than the $150,000 originally agreed upon only because Camarda had decided he did not want to pay the full amount. Gillock was dissatisfied, but he had no recourse. He did express his dissatisfaction to both Camarda and, at a later date, Ayers. The money was not paid directly to Gillock but rather, at his request, to the Forsythe Vending Company. The president of Forsythe Vending, William Forsythe, was a close friend of Gillock. Gillock characterized the payment to Forsythe as a loan. Over the next three years, Forsythe gradually repaid Gillock the debt. He paid no money directly to Gillock. Instead, he paid some of Gillock's bills — attorney's fees, car payments, mortgage payments, and the like. Gillock never reported the $130,000 on his 1978 income tax returns.

This $130,000 commission, and a telephone call between Drew and Gillock arranging delivery of the check, later formed the basis for one of the two wire fraud counts against the defendants, one of the extortion counts against Gillock, and one of the tax counts against Gillock.

After paying Gillock his fee, Camarda still had $59,000 remaining. This amount he split with Bibby and Ayers pursuant to their ongoing agreement.

On June 14, 1982, a federal grand jury returned a twenty-count indictment against Gillock, Ayers, and Bibby. The indictment charged all three defendants with one conspiracy count, six mail fraud counts, and two wire fraud counts. The indictment also charged Gillock alone with seven Hobbs Act violations and four counts of tax fraud. One of the tax counts resulted from the above-mentioned failure to report as income the $130,365.31 fee from the Shelby County computer sale.

The other three counts charged Gillock with making impermissible deductions for attorney's fees in calendar years 1977, 1979 and 1980. The trial began on October 12, 1982. The jury found all three defendants guilty on the nine counts common to each of them. The jury acquitted Gillock on the attorney's fee deduction counts but convicted him on the failure-to-report count. It also convicted him on the Hobbs Act charge stemming from the receipt of the $130,000 in the Shelby County deal. Because it could not reach a verdict on the other Hobbs Act counts, the trial judge declared a mistrial with respect to them. Bibby and Ayers were sentenced to three-and-one-half year concurrent sentences for each of their convictions and fined $10,000. Gillock was sentenced to four-year concurrent sentences for all but the tax conviction, for which he was given a three-year consecutive sentence. He was also fined $10,000.

On appeal, the defendants raise a number of issues. The first we must consider are defendants' allegations of misjoinder. Rule 8 of the Federal Rules of Criminal Procedure establishes limits for joinder of both defendants and offenses in the same trial:

> (a) **Joinder of Offenses.** Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) **Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Bibby and Ayers argue that joinder of the tax counts against Gillock with the fraud and conspiracy counts against them is a violation of Rule 8(b) because the tax counts are not part of the "same act or transaction or in the same series of acts or transactions" as the fraud counts. They are at least partially correct. It is appropriate to combine tax charges against one defendant with fraud charges against that same defendant and other codefendants if the tax evasion charges arise directly out of the common illicit enterprise. *See United States* v. *Kopituk*, 690 F.2d 1289, 1313 (11th Cir. 1982); *United States* v. *Kenny*, 645 F.2d 1323, 1344 (9th Cir.), *cert. denied*, 454 U.S. 828 (1981). Failure to report the income from an illegal activity is an act which does arise directly out of the common enterprise because concealment of ill-gotten gain is an integral part of assuring the success of that illegal activity. Accordingly, inclusion of Count 17 in the indictment, charging Gillock with failure to report the $130,000 kickback on his 1978 tax return, was proper. The same cannot be said for Counts 18-20, which allege only that Gillock claimed excessive deductions for attorney's fees on his 1977, 1979, and 1980 tax returns. The fraudulent deduction of attorney's fees had absolutely nothing to do with defendants' overall scheme to defraud Honeywell. Accordingly, Counts 18-20 were misjoined with respect to Bibby and Ayers.

Gillock's argument for misjoinder relies on subdivision (a) of Rule 8 regarding joinder of offenses against the same defendant. The joinder provisions of Rule 8(a) are more liberal than those of 8(b) because they allow inclusion of offenses of the "same or similar character" as well as those arising from the same act or transaction or a common scheme. Under this standard, it would have been appropriate to join all the tax charges together against Gillock because they are of the same or similar character. Also, for the reasons stated above, it would have been acceptable to join Count 17 (failure to report) with the other fraud and conspiracy counts, but it is still

not acceptable to combine Counts 18-20 with the other charges contained in the indictment. These are of "same or similar character" as Count 17, yet are wholly unrelated to any of the other charges. Accordingly, we find that misjoinder was also present in the charges against Gillock with respect to Counts 18-20.

Traditionally, the remedy for Rule 8 misjoinder was automatic reversal. *See, e.g., United States* v. *Reynolds*, 489 F.2d 4, 6 (6th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974); *Ingram* v. *United States*, 272 F.2d 567, 570 (4th Cir. 1959). Recently, however, a number of courts have recognized that misjoinder can, in some circumstances, constitute harmless error. *See, e,g,. United States* v. *Halper*, 590 F.2d 422, 433 (2d Cir. 1978) (misjoinder harmless if "our conviction is sure that the error did not influence the jury or had but slight effect"); *United States* v. *Martin*, 567 F.2d 849, 854 (9th Cir. 1977). The harmless error rule was recognized by this Court in *United States* v. *Hatcher*, 680 F.2d 438, 442 (6th Cir. 1982). In *Hatcher*, we held that the harmless error rule is to be applied "with great caution" and "only where the unrelated charge and the evidence supporting that charge is such an inconsequential part of the joint indictment that no possible harm from the misjoinder could reasonably have occurred." *Id.* The misjoinder is not harmless "if the extent of the proof [of the misjoined charges] is significantly greater than that reasonably used to demonstrate other crimes or if focus of the trial is shifted away from proof of the properly joined offense[s]." *Id.*

We have examined both the indictment and the trial transcript to determine if any possible harm could reasonably have occurred from the misjoinder of tax Counts 18-20. Our survey revealed the following: (1) Counts 18-20 comprised less than two full pages of the thirty-page indictment; (2) approximately sixty pages of the 2,450-page trial transcript directly related to testimony about tax reporting of attorney's fees deductions; (3) of forty-five witnesses in the case, only

four testified with reference to Counts 18-20. From the above, it is readily apparent that Counts 18-20 did not play a central part in this case.

Moreover, there are additional factors present in this case which make it highly unlikely that any of the defendants were actually harmed by the misjoinder. First and foremost, Gillock was actually *acquitted* on the misjoined charges. This acquittal shows two things: (1) Gillock was not prejudiced with respect to the misjoined charges themselves; and (2) neither he nor the other defendants were prejudiced with respect to the other charges because prejudice will not result from accusations not believed. The second conclusion assumes, of course, that the jury actually believed that the acquitted charges were not true. An analysis of the evidence shows that assumption to be a reasonable one. The evidence on Counts 18-20 was equivocal at best. Gillock was entitled to deduct the attorney's fees which he claimed, just not in the particular years in which he claimed them. Gillock testified that he relied on his secretary and his accountant to make sure that the deductions were allocated to the appropriate years. He said he did not pay close attention to the details of his return. Under these circumstances, there was considerable doubt that Gillock had the necessary criminal intent, and the jury acquitted. By contrast, on Count 17, where the evidence was strong – Gillock admitted receiving the money, admitted it was not a gift, and admitted not reporting it – the jury convicted.

Finally, we note that the nature of the misjoined charges greatly reduced the likelihood of prejudice with respect to Bibby and Ayers. Tax offenses, like taxes, are very discreet, very individualistic matters. The evidence necessary to prove them is readily distinguishable from that necessary to prove other offenses. They are peculiarly a matter between a taxpayer and his government. Accordingly, it is most improbable that a jury would allow alleged indiscretions on Gillock's tax

return to influence their deliberations on the guilt or innocence of Bibby and Ayers on other, non-tax matters.

For all of these reasons, then, the minor role played at trial, the jury's acquittal, and the nature of the charges involved, we conclude that the misjoinder of Counts 18-20 in this indictment and trial was harmless error as to all three defendants.

Bibby and Ayers also make a misjoinder claim based on Rule 14 of the Federal Rules of Criminal Procedure. Rule 14 allows a trial judge to order separate trials for defendants joined in the same indictment if he believes a joint trial would be prejudicial to the defendants. Bibby and Ayers argue that their trials should have been severed from Gillock's as to all the counts because the case against Gillock was so much stronger, because Gillock's testimony at the trial was so inflammatory, and because there was so much adverse pretrial publicity about Gillock.

The severance decision under Rule 14 is generally left to the sound discretion of the trial judge and will not be reversed absent a showing of abuse of that discretion. *United States* v. *Whitley*, No. 83-5428, slip op. at 17 (6th Cir. May 2, 1984); *United States* v. *Goldfarb*, 643 F.2d 422, 434 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981). The defendant carries a heavy burden requiring him to make a strong showing of prejudice before a reversal will be granted. *United States* v. *Davis*, 707 F.2d 880, 883 (6th Cir. 1983). Bibby and Ayers have failed to carry that burden. Their allegation of adverse pretrial publicity is just that, only an allegation. They offer no supporting evidence. Their assertion that the evidence against Gillock was strong and the evidence against them was weak is simply wrong. As to their claim about Gillock's inflammatory references to his prior appearances in court, these statements, while unfortunate, were not sufficiently prejudicial to require a severance. Accordingly, we find that the trial judge did not abuse his discretion in refusing to order separate trials.

Defendants next argue that the indictment alleged a single conspiracy when there were, in fact, multiple conspiracies. If the defendants are correct in this assertion, and they can prove that they were prejudiced by this variance between the indictment and the proof, they are entitled to a reversal of their convictions. *Kotteakos* v. *United States*, 328 U.S. 750 (1946); *United States* v. *Warner*, 690 F.2d 545, 548 (6th Cir. 1982). The defendants argue that the government actually established three separate conspiracies. The first conspiracy was the scheme to pay Gillock $4,000 for his help in obtaining the Tennessee Department of Employment Security contract. The second conspiracy was the profit-splitting agreement between Camarda, Bibby and Ayers. The third conspiracy involved the payments to Gillock for his help in the Shelby County transaction. According to the defendants, each conspiracy had a separate objective and a distinct cast of characters. The defendants contend that to include them all in a single conspiracy count and to charge, as the trial judge did, that the jury must find each defendant guilty of one single conspiracy or none at all, was wrong and highly prejudicial to each defendant.

We agree that there was more than one conspiracy shown, but we do not agree that all the defendants were prejudiced thereby. The main conspiracy here was a conspiracy to defraud Honeywell of the honest, loyal and faithful performance of its employees. The core of this conspiracy was the arrangement between Bibby, Ayers and Camarda to split the profits on Honeywell computer sales financed by Camarda's company. The Shelby County transaction, in which Gillock received $150,000, and which formed the basis of the fraud counts against all three defendants, was only one of many transactions in which Bibby and Ayers skimmed off profits as a result of their agreement with Camarda. However, the conspiracy involving payments to Gillock for his help in securing the Tennessee Department of Employment Security contract was not

part of this overall plan. The evidence shows that after Gillock was paid, there were no further contacts between Gillock and Honeywell employees for two years. Any conspiracy that had existed had expired long before Gillock was recruited to work on the Shelby County contract.

Nonetheless, we find that neither Bibby nor Ayers was prejudiced by this discrepancy between the indictment and the proof. All of the evidence of the State of Tennessee conspiracy would have been admissible in a separate conspiracy trial involving only the Bibby/Ayers/Camardo profit-splitting agreement and the Shelby County contract. It would be relevant to show the extent of the prior relationship between Gillock and Honeywell and to show the manner in which Honeywell employees had used indirect payment vehicles in the past to compensate Gillock because direct payment was against company policy. It would also be relevant to show that Gillock knew the payments from Honeywell were improper because of the clandestine nature in which they were always made. Accordingly, we find no prejudice in the joining together of two conspiracies in a single indictment.

Given our characterization of the central conspiracy, however, the question arises whether Gillock was ever really a part of it. The record does not show any evidence that Gillock ever knew about the profit-splitting agreement between Camarda, Bibby and Ayers. An essential part of any conspiracy conviction is a showing that a particular defendant knew of and adopted the conspiracy's main objective. *See, e.g., United States* v. *Smith*, 700 F.2d 627, 632 (11th Cir. 1983). The evidence did establish Gillock's participation in a smaller conspiracy, the one involving only the Shelby County contract. Nevertheless, his conspiracy conviction cannot stand because he was prejudiced by the variance between the indictment and the proof. A substantial amount of evidence was introduced at trial detailing the Bibby/Ayers/Camarda profit-splitting arrangement, evidence that woud not have been admissible in a

separate trial on the Shelby County contract alone. Accordingly, the conspiracy conviction against Gillock must be reversed.

It does not follow, however, that Gillock's mail and wire fraud convictions, because based on the same factual framework as the conspiracy charge, must also be reversed. The elements of the two offenses are different:

> The predicate for liability for conspiracy is an agreement, and a defendant is punished for his membership in that agreement. Mail . . . fraud, on the other hand, punishes the *act* of using the mails . . . to further a scheme to defraud. No agreement is necessary . . . . [A defendant] is liable for mail fraud as a principal or as an aider and abettor, not a conspirator. As an aider or abettor, [a defendant] need not agree to the scheme. He need only associate himself with the criminal venture and participate in it.

United States v. *Read*, 658 F.2d 1225, 1240 (7th Cir. 1981). Accordingly, it is not necessary that Gillock have been aware of all aspects of the scheme in order to be guilty of fraud. All that must be shown is that Gillock's conduct aided the execution of the scheme. That much the government did establish.

The defendants also make several evidentiary claims. First, defendant Gillock argues that the district judge failed to make the necessary findings as required by *United States* v. *Enright*, 579 F.2d 980, 986 (6th Cir. 1978), before admitting co-conspirator hearsay statements pursuant to Federal Rule of Evidence 801(d)(2)(E). Following oral argument and after reviewing the record, we recognized that Gillock's assertion was correct, and we remanded the case to district court, pursuant to *United States* v. *Holloway*, 731 F.2d 378 (6th Cir. 1984), for that court to make the *Enright* finding. Upon remand, the district judge, after a lengthy and comprehensive hearing, found that all hearsay evidence was properly admitted under *Enright*.

The district judge, however, based his *Enright* finding on the view that only one conspiracy existed, and as we have discussed, there were multiple conspiracies in this case. Although we usually would remand the case to the district judge to make further findings consistent with our conclusion, we feel that in this case, where we are already well acquainted with the record and where the district court has supplied us with extensive factual findings following a hearing, we can adequately evaluate whether the hearsay evidence was properly admitted. *See United States* v. *Holloway*, 731 F.2d at 382. Based on our own review of the record, we conclude that any hearsay evidence was properly admitted under Federal Rule of Evidence 807(d)(2)(E). We therefore find no reversible error on this claim.

The defendants next argue that the trial judge erred in not requiring the government to produce the Internal Revenue Service's tax audit of Jack Cadarmo. According to them, this tax audit could have provided them with valuable impeachment evidence because it could have established a motive for Camarda to falsify his testimony. Kickbacks of the type Camarda described in his profit-sharing agreement with Bibby and Ayers are deductible tax items. In general, a prosecutor is required, upon request, to give a defendant any exculpatory information the prosecutor may have which is material to guilt or innocence. *Brady* v. *Maryland*, 373 U.S. 83 (1963). The *Brady* requirement has been extended to include evidence tending to impeach a government witness. *Giglio* v. *United States*, 405 U.S. 150 (1972). However, the *Brady* requirement only applies to evidence which the prosecutor knew or should have known was exculpatory. *United States* v. *Agurs*, 427 U.S. 97, 110 (1976). Moreover, *Brady* does not apply to evidence not in the prosecutor's possession. *See United States* v. *Escobar*, 674 F.2d 469, 479 (5th Cir. 1982); *United States* v. *Hutcher*, 622 F.2d 1083, 1088 (2d Cir.), *cert denied*, 449 U.S. 875 (1980). The purpose of *Brady* and its progeny is not to require

the prosecutor to search out exculpatory evidence but rather to divulge whatever exculpatory evidence he already has. When, as here, the record shows that the prosecutor had never seen the tax audit, never had it in his possession, and did not know what it contained, *Brady* does not require that he obtain it and give it to the defense. If the defendants wanted the tax audit, the proper course was to seek it from the IRS itself.

Bibby and Ayers also argue that the trial judge should have required, pursuant to Federal Rule of Criminal Procedure 17(c), that Camarda produce certain documents he used to calculate his kickback payments to Bibby and Ayers. Camarda did produce one set of documents pursuant to a Rule 17(c) subpoena, but they did not turn out to be what Bibby and Ayers wanted. Accordingly, during the middle of the trial, they asked the trial judge to issue another subpoena for additional documents. At the hearing on their request, Camarda's attorney reported that this second subpoena covered over 4,500 pages of documents and still would not produce what the defendants were after. The trial judge declined to issue the second subpoena on the ground that it was excessively burdensome and would serve no purpose.

Once again, our review of the trial judge's decision is limited to determining whether he has abused his discretion in declining to issue the subpoena. *United States* v. *Nixon*, 418 U.S. 683, 702 (1974); *United States* v. *Florea*, 541 F.2d 568, 574 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). We find that he did not. The record shows that defendants were allowed extensive discovery of Camarda and were provided with numerous documents. The record further shows that defendants would not be able to accomplish that which they wished to accomplish with the subpoena and that compliance with the subpoena would indeed be burdensome. Accordingly, the decision to deny the subpoena was not error.

Moving to the substantive issues in the case, all the de-

fendants argue that there was insufficient evidence to find them guilty of attempting to defraud or actually defrauding, by mail or wire, anyone or anything. In order to establish a violation of the mail fraud statute, 18 U.S.C. § 1341, the government must prove both (1) a scheme to defraud, and (2) a mailing for the purpose of executing the scheme. *Pereira* v. *United States*, 347 U.S. 1, 8 (1954); *United States* v. *Strong*, 702 F.2d 97, 100 (6th Cir. 1983). The "scheme to defraud" element has been defined by this Court to be "a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." *United States* v. *Van Dyke*, 605 F.2d 220, 225 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979). The mailing requirement is satisfied when use of the mails is a reasonably foreseeable consequence of the scheme to defraud. *Pereira*, 347 U.S. at 8-9; *United States* v. *Calandrella*, 605 F.2d 236, 253 (6th Cir.), *cert. denied*, 444 U.S. 991 (1979). A violation of the wire fraud statute, 18 U.S.C. § 1343, requires a showing of essentially the same things, the only difference being that a wire communication, e.g., telephone call, is required instead of a mailing. *See United States* v. *Lemire*, 720 F.2d 1327, 1334-35 (D.C. Cir. 1983); *United States* v. *Morelli*, 643 F.2d 402, 412 (6th Cir.), *cert. denied*, 453 U.S. 912 (1981); *United States* v. *Conte*, 349 F.2d 304, 306 (6th Cir.), *cert. denied*, 382 U.S. 926 (1965).

The defendants argue that there was no fraud because all of the parties involved in the Shelby County transaction, the sale that formed the basis of the fraud counts, benefited from a good bargain. Honeywell's sale price was well within the range of its allowable discount. Shelby County paid much less than the retail sales price. And any money that went to the defendants came out of Camarda's pocket, not Honeywell's or Shelby County's. Finally, payments that were made to Gillock were a necessary business expense to enable the transaction to succeed.

The defendants' logic is not convincing. The fact remains that had Gillock not received his $150,000 fee, had Bibby and Ayers not pocketed $18,000 each, the sales price would have been even lower. And if Honeywell and Shelby County had known about these kickbacks and commissions, which were directly contrary to Honeywell policy, they would certainly have felt defrauded. It is simply not possible to characterize this entire transaction as "a reflection of fair play and right dealing in the general and business life of society."

A case from the Seventh Circuit, *United States* v. *George*, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973), supports our conclusion that defendants' conduct is actionable under the fraud statutes. In *George*, a buyer for Zenith Corporation bought television cabinets from a company whose president happened to be a friend of his. In exchange for the business, the friend gave the Zenith buyer substantial kickbacks on the purchase price. Both the buyer, the seller, and a third-party intermediary were found guilty of mail fraud. At the time, Zenith had in effect a conflict of interests policy forbidding this type of conduct by its employees. Our situation is very similar. Bibby and Ayers are the sellers receiving the kickbacks. Camarda, as financier, takes the place of the buyer who pays the kickback. And Honeywell has a conflict-of-interests policy which prohibits these kinds of payments. Therefore, because the six $3,000 payments to Gillock were a necessary part of the overall scheme and a reasonably foreseeable consequence thereof, Bibby and Ayers were properly convicted on six counts of mail fraud.

Gillock agrees that *George* may be controlling as to Bibby and Ayers but not as to himself. He argues that there was no evidence that he intended to deprive Honeywell of the loyal and faithful services of its employees or that he was aware that there was anything wrong with his acceptance of fees from Honeywell for his services. He claims not to have known about Honeywell's policy prohibiting payments to public of-

ficials. Nevertheless, Gillock's manner of receiving what he claims to have been legitimate commissions and fees contradicts his contention that he acted innocently. The six $3,000 payments (Counts 2-5, 7, 8) all came from Manmark, Inc., a company in no way associated with Honeywell. His $4,000 payoff for the State of Tennessee sale was funneled through yet another unaffiliated corporation, Public Services, Inc. Finally, his $130,365.51 commission on the Shelby County contract came from Camarda and was paid, at Gillock's request, to Gillock's friend, Mr. Forsythe. Moreover, before being paid for his work on the State of Tennessee project, he was told by Jack Owen that there was no way that Honeywell could pay him directly for his services. All of this combines to make it highly unlikely that Gillock did not know he was being paid money by Honeywell to which he was not entitled. The issue of fraudulent intent under section 1341 is for the jury, *see United States* v. *Van Dyke*, 605 F.2d 220, 225 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979), and we find that a reasonable juror could have concluded from the available evidence that Gillock's receipt of the monies at issue was fraudulent.

The analysis regarding the wire fraud counts is essentially the same. Here, however, there is some question concerning the validity of Count 6, the count involving a phone call between Jack Camarda and Gillock on August 29, 1978. The government's proof established that such a call was made but it did not establish what was said during that call. Camarda could not remember. As a result, the government did not show that the call was "for the purpose of executing the scheme." Accordingly, the conviction of all three defendants on Count 6 must be reversed. The other wire fraud charge, Count 9, involving the phone call from Gillock to Drew on October 19, 1978 to arrange for the payment of Gillock's commission on the Shelby County deal, is supported by the evidence and so must be affirmed.

Gillock also contends that his conviction for violation of the

Hobbs Act, 18 U.S.C. § 1951, for accepting the $130,365.51 commission should be reversed. The Hobbs Act makes it illegal to "affect commerce . . . by extortion," extortion being defined as, among other things, "the obtaining of property from another, with his consent, ... under color of official right." Gillock argues that his receipt of the $130,000 was not "under color of official right" because he lacked either actual or apparent authority to authorize computer purchases by either the State of Tennessee or Shelby County. He relies heavily on the Eighth Circuit case of *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979), to support his position. In *Rabbitt*, the court held that it was not a violation of the Hobbs Act for a Missouri state representative to use his influence and connections to help an architectural firm win contracts from the State of Missouri in exchange for ten percent commission on the contracts so awarded. The state representative had no direct control over the award of such contracts.

This Court has held that a state official's acceptance of money violates the Hobbs Act "so long as the motivation for the payment focuses on the recipient's office." *United States* v. *Harding*, 563 F.2d 299, 307 (6th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978) (quoting *United States* v. *Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975)).[1] What matters is not whether the official has "actual *de jure* power to secure" the desired item, but whether the person paying him "held, and defendant exploited, a reasonable belief that the state system so operated that the power in fact of defendant's office included the authority to determine recipients of the [contracts] here involved." *United States* v.

[1] Obviously, this rule cannot be applied literally. Otherwise any political contribution could conveivably provide the basis for a Hobbs Act charge. What the Hobbs Act proscribes is the taking of money by a public official in exchange for *specific* promises to do or refrain from doing *specific* things. *See United States* v. *Dozier*, 672 F.2d 531, 537 (5th Cir.), *cert. denied*, 103 S. Ct. 256 (1982). In other words, there must be a *quid pro quo*.

Mazzei, 521 F.2d 639, 643 (3d Cir.) (en banc), *cert. denied*, 423 U.S. 1014 (1975).

The factual setting in the *Mazzei* case closely parallels our own. The defendant was a Pennsylvania state senator. The senator helped persuade a state executive agency over which he had no statutory power to locate an office in a particular building. In exchange for this assistance, the building's owner paid the senator ten percent of the gross value of the lease. This was found to violate the Hobbs Act. The only difference between that case and our own is a matter of degree. The Pennsylvania state senator's effective control over the leasing decisions of the state agency may have been somewhat stronger than Gillock's over Shelby County's contracting decisions. Nevertheless, we believe that Gillock's past performance on the State of Tennessee contract, combined with his assurances to Oliver Drew that he had "influence in Shelby County," were sufficient to create a reasonable belief that he could deliver the goods. That is sufficient to trigger the provisions of the Hobbs Act. In our view, it is not essential that a state official be able to guarantee a certain result before his acceptance of money to bring about that result will run afoul of the law. Reasonable prospects of success are sufficient. Indeed, if the facts of this case required it, we would be inclined to say that any attempt by a public official to sell his influence over others runs afoul of the Hobbs Act. Political influence is not a commodity to be bought and sold on the open market. Gillock's attempts to do just that cannot be squared with the plain meaning of the statute which prohibits the taking of money "under color of official right." As we stated before, there is a violation "so long as the motivation for the payment focuses on the recipient's office." *Harding*, 563 F.2d at 307.

Finally, Gillock argues that the district court erred in refusing to include a gift theory defense in the jury instruction and that the district judge was prejudiced against him. Based on our review of the record, we find these claims to be without merit.

Accordingly, the decision of the district court is affirmed except for the convictions on Count 6, which are reversed for lack of sufficient evidence, and Gillock's conviction on the conspiracy count. However, because these reversals do not affect the defendants' sentences, those sentences are affirmed in their entirety.

No. 82-5717

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	March 1, 1985
	)	John P. Hehman,
Plaintiff-Appellee	)	Clerk
	)	
v.	)	O R D E R
	)	
EDGAR HARDIN GILLOCK,	)	
	)	
Defendant-Appellant	)	

BEFORE: MARTIN, CONTIE and WELLFORD, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the

suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

John P. Hehman, Clerk

18 U.S.C. §2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such

matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. §1343. Fraud by wire, radio or television.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. §1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section -

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or

property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such

State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect Section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

26 U.S.C. §7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Rule 8 of the Federal Rules of Criminal Procedure.

Joinder of Offenses and of Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may

be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure.

Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Rule 104 of the Federal Rules of Evidence.

Preliminary Questions

(a) Questions of admissibility generally.

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters

shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 611 of the Federal Rules of Evidence.

Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his

testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 801 of the Federal Rules of Evidence.

Definitions.

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if-

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-

examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

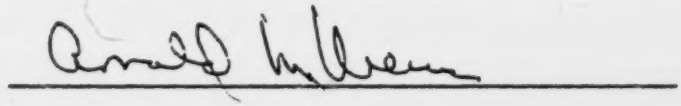
(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a

matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

CERTIFICATE OF SERVICE

I, Arnold M. Weiss, Attorney for Petitioner, hereby certify that I have this 24 day of May, 1985, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon The Honorable W. Hickman Ewing, United States Attorney, Federal Building, Memphis, Tennessee 38103; Mr. Henry L. Klein, Attorney for Allen Bibby, 770 Estate, Memphis, Tennessee 38119; Mr. Andrew Ekonomou, Attorney for A. Arthur Ayers, Suite 515, Rhodes-Haverty Building, 134 Peachtree Street, N,W., Atlanta, Georgia 30303; and Mr. John Hehman, Clerk, United States Court of Appeals for the Sixth Circuit, U.S. Post Office and Courthouse Building, Cincinnati, Ohio 45202; Solicitor General, Department of Justice,

Washington, D.C. 20530; The Honorable Robert M. McRae, Judge, United States District Court for the Western District of Tennessee, 1107 Federal Building, 167 North Main Street, Memphis, Tennessee 38103; copies of the foregoing Appendix to the Petition for Writ of Certiorari filed by Edgar Hardin Gillock by placing copies of the same in the United States mail, properly addressed, and with sufficient postage affixed thereto.



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No. 84-1851

In the Supreme Court of the United States

OCTOBER TERM, 1985

EDGAR HARDIN GILLOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that the misjoinder of three counts of the indictment was harmless error and therefore did not require reversal of petitioner's convictions.

2. Whether the evidence was sufficient to support petitioner's convictions for mail fraud, wire fraud, and extortion.

3. Whether evidence was properly admitted at trial under the co-conspirator exception to the hearsay rule.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1851

EDGAR HARDIN GILLOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 752 F.2d 1116.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1985. A petition for rehearing was denied on March 1, 1985 (Pet. App. 21-22). On April 22, 1985, Justice O'Connor extended the time for filing a petition for a writ of certiorari to May 30, 1985, and the petition was filed on May 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on six counts of mail fraud, in violation of 18 U.S.C. 1341, two counts of wire fraud, in violation of 18 U.S.C.

1343, one count of extortion, in violation of 18 U.S.C. 1951, one count of tax evasion, in violation of 26 U.S.C. 7201, and one count of conspiracy, in violation of 18 U.S.C. 371. Petitioner was acquitted on three counts of making false tax returns, in violation of 26 U.S.C. 7206, and a mistrial was declared with respect to six counts charging him with extortion. He was fined $10,000 and sentenced to concurrent terms of four years' imprisonment on the fraud, extortion, and conspiracy counts and a consecutive three-year term on the tax evasion count. The court of appeals affirmed except with respect to one of the wire fraud counts and the conspiracy count (Pet. App. 1-20).[1]

1. The evidence at trial showed that petitioner, a former Tennessee state senator, used his influence to assist in the sale of Honeywell computers to state and local governments in exchange for payments in excess of $150,000. Oliver Drew and Jack Owen, two Honeywell employees, approached petitioner in 1975, seeking his assistance in their efforts to sell a Honeywell computer to the Tennessee Department of Employment Security. After the Department announced plans to purchase the computer, petitioner asked Owen for compensation. Owen replied that Honeywell had a policy of prohibiting payments to public officials, but he contrived a scheme to pay petitioner $4,000 indirectly through a consulting firm. Pet. App. 1-2.

In 1976, co-defendants Allan Bibby and A. Arthur Ayers, Honeywell executives, devised a plan to defraud the company by obtaining kickbacks from several sales of Honeywell computers financed by Financial Marketing Services,

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[1]Co-defendants Allan Bibby and A. Arthur Ayers were convicted on the conspiracy, mail fraud, and wire fraud counts. The court of appeals affirmed their convictions except with respect to one of the wire fraud counts. Bibby has sought review by this Court. *Bibby* v. *United States*, No. 84-1692.

Inc., which was owned by Jack Camarda, a former Honeywell employee. As a result of this scheme, Bibby and Ayers each received $600,000 from Camarda out of the proceeds of 12 computer sales over the course of four years. In order to conceal the payments from Honeywell, they were funnelled through a cattle ranching operation. Pet. App. 2-3.

One of the sales involving kickbacks was to Shelby County, Tennessee. Petitioner agreed with his co-defendants and Camarda to use his influence to convince the county to purchase an upgraded Honeywell computer system. They paid him $3,000 per month for six months as a retainer and $130,000 as a commission after the sale was finalized. The commission was paid to a company operated by a friend of petitioner's, who then used the money to pay some of petitioner's bills. Petitioner never reported the commission as taxable income. Pet. App. 3-4.

2. The court of appeals concluded that three counts charging petitioner with tax fraud in connection with unrelated deductions for attorney's fees were improperly joined under Fed. R. Crim. P. 8 with the counts relating to the Honeywell transactions (Pet. App. 5-7). The court concluded, however, that the misjoinder was harmless error in view of petitioner's acquittal on the misjoined counts, the relatively insignificant attention devoted to them at trial, and the discrete nature of the misjoined offenses (*id.* at 7-9).

The court of appeals reversed petitioner's conspiracy conviction on the ground that he was not part of the central conspiracy between his co-defendants and Camarda to split the profits from a series of computer sales, but rather was involved only in a conspiracy with respect to the Shelby County sale (Pet. App. 11-12). Notwithstanding the proof of multiple conspiracies, the court of appeals concluded that the record adequately supported the admission of co-conspirator statements under Fed. R. Evid. 801(d)(2)(E) (Pet. App. 12-13).

Finally, the court of appeals ruled that, with the exception of one wire fraud count, the evidence was sufficient to sustain petitioner's convictions for mail fraud, wire fraud, and extortion.[2] As to the fraud counts, the court reasoned that Honeywell had been defrauded by the defendants' receipt of kickbacks and that petitioner was aware that he was not entitled to the funds that he received (Pet. App. 15-17). With respect to the extortion count, the court concluded that petitioner violated the Hobbs Act (18 U.S.C. 1951) by receiving money in exchange for his promise to use his influence as a state official to assist in closing the sale with Shelby County (Pet. App. 18-19).

ARGUMENT

1. Petitioner contends first (Pet. 25-40) that his convictions should be reversed on the basis of misjoinder.

a. Referring to the misjoined tax offenses, petitioner argues (Pet. 25-27, 33-40) that misjoinder may never be considered harmless error. This question is identical to that presented in *United States* v. *Lane*, cert. granted, No. 84-744 (Feb. 19, 1985). Accordingly, the petition should be held with respect to this question pending the Court's decision in *Lane*, and then disposed of as appropriate in light of that decision.[3]

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[2]The court of appeals reversed the one wire fraud count because the government had not proven what was said during the phone call that formed the basis for that count (Pet. App. 17).

[3]We have recommended the same course with respect to the petition filed by co-defendant Bibby (No. 84-1692).

To the extent that petitioner is also arguing that even if misjoinder may constitute harmless error, the court of appeals erred in concluding that the error was harmless here, that factbound contention obviously does not merit review by this Court. Especially in view of petitioner's acquittal on the misjoined counts and their minor role at trial, he could not have been harmed by their presence in the case. See Pet. App. 7-9.

b. Petitioner also contends (Pet. 28-33) that he was prejudicially misjoined with his co-defendants in light of the reversal of his conspiracy conviction. This argument lacks merit. It is well settled that, at least in the absence of bad faith (which is not alleged here), dismissal of a conspiracy count does not retroactively invalidate the initial joinder under Fed. R. Crim. P. 8(b). *Schaffer* v. *United States*, 362 U.S. 511, 513-517 (1960). Moreover, even without the conspiracy count, the joinder of all defendants plainly was proper here, as they had "participated * * * in the same series of acts or transactions constituting an offense or offenses" under Rule 8(b). In particular, all of the defendants were charged and convicted on the same mail and wire fraud counts. Accordingly, there was no misjoinder apart from the tax counts involving attorneys' fees.

2. Relying on *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979), petitioner argues next (Pet. 40-52) that the evidence was insufficient to support his convictions for fraud and extortion. The court of appeals correctly rejected this claim.

a. The defendant in *Rabbitt* was a Missouri state legislator. In return for a fee, he introduced an architectural firm to persons who might have been able to secure governmental construction contracts for the firm (583 F.2d at 1020-1021). His prosecution for mail fraud rested on the theory that he had defrauded the citizens of Missouri (*id.* at 1024-1025). The court of appeals reversed the mail fraud convictions because there was no evidence that the defendant's conduct had injured the public or affected the performance of his duties (*id.* at 1026).

Here, by contrast, petitioner was charged with defrauding Honeywell, not the citizens of Tennessee. The court of appeals correctly found (Pet. 15-17) that Honeywell had in fact been injured by petitioner's fraud because petitioner's

receipt of kickbacks violated the company's policy against payments to public officials and because the company was deprived of the loyal and faithful services of its employees.[4] No monetary loss is required, although in fact the kickbacks here by their nature prevented Honeywell from receiving a higher profit or offering a lower price (which may have helped it to obtain business in the future). The courts of appeals have uniformly held that the mail fraud statute extends to breaches of duty similar to that involved in this case, and this Court has consistently declined to review those decisions.[5] There is no reason for a different result here.

b. Nor is petitioner's extortion conviction inconsistent with *United States* v. *Rabbitt, supra.* Under the Hobbs Act, it is illegal to "obtain[] * * * property from another, with his consent, * * * under color of official right" (18 U.S.C. 1951(b)(2)). In *Rabbitt*, the court of appeals applied

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[4]Petitioner's clandestine receipt of the kickbacks (see Pet. 16-17) negates any claim of ignorance of the company's policy on his part.

[5]See, *e.g., United States* v. *Venneri*, 736 F.2d 995 (4th Cir. 1984), cert. denied, No. 84-266 (Nov. 26, 1984); *United States* v. *Feldman*, 711 F.2d 758, 763 (7th Cir.), cert. denied, 464 U.S. 939 (1983); *United States* v. *Bronston*, 658 F.2d 920, 926-927 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States* v. *Shamy*, 656 F.2d 951, 957 (4th Cir. 1981), cert. denied, 455 U.S. 939 (1982); *United States* v. *Barta*, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *Mandel*, 591 F.2d 1347, 1361-1364, vacated on other grounds, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *Castor*, 558 F.2d 379, 383 (7th Cir. 1977), cert. denied, 434 U.S. 1010 (1978); *United States* v. *Bush*, 522 F.2d 641, 646-648 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *United States* v. *Keane*, 522 F.2d 534, 544-546 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); *United States* v. *Bryza*, 522 F.2d 414 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *States*, 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974); *United States* v. *George*, 477 F.2d 508 (7th Cir.), cert. denied, 414 U.S. 827 (1973).

(583 F.2d at 1027) the established rule that a public official violates the Hobbs Act by receiving payments in connection with the performance of an official function even where "[t]he official [does] not control the function in question," so long as "the extorted party possesses a reasonable belief in the official's powers." However, no such belief was proven in that case (*id.* at 1028). Here, on the other hand, the court of appeals, applying the same rule, expressly found (Pet. App. 19) that petitioner's "past performance on the State of Tennessee contract, combined with his assurances to Oliver Drew that he had 'influence in Shelby County,' were sufficient to create a reasonable belief that he could deliver the goods." This was plainly sufficient to violate the statute. See, *e.g.*, *United States* v. *Rindone*, 631 F.2d 491, 495 (7th Cir. 1980); *United States* v. *Mazzei*, 521 F.2d 639, 643 (3d Cir.) (en banc), cert. denied, 423 U.S. 1014 (1975).

3. Finally, petitioner argues (Pet. 52-62) that the admission of certain co-conspirator statements under Fed. R. Evid. 801(d)(2)(E) was erroneous because the district court incorrectly assumed that only one conspiracy had been proven at trial. The court of appeals, however, took note of this problem and concluded (Pet. App. 13), after reviewing the record, that the evidence was properly admitted even though multiple conspiracies had existed. This factbound conclusion obviously does not warrant review by this Court.

CONCLUSION

The petition should be held with respect to Question 1 pending the Court's decision in *United States* v. *Lane*, No. 84-744, and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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No. 84-1851

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IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1985

EDGAR HARDIN GILLOCK,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY
TO BRIEF OF THE UNITED STATES

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BEST AVAILABLE COPY

A. QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Sixth Circuit's finding of misjoinder requires reversal of defendant Gillock's conviction.

(2) Whether the Sixth Circuit's decision in the case before this Court can be reconciled with the Eighth Circuit's ruling in United States v. Rabbit, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979) and, if not, which ruling is correct.

(3) Whether reversal of a conspiracy conviction due to a fatal variance between the indictment and the proof offered at trial requires reversal of remaining convictions which were based in large part on alleged co-conspirators' hearsay statements erroneously admitted under FRE 801(d)(2)(E).

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 84-1851

EDGAR HARDIN GILLOCK, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES

COUNTER-STATEMENT OF THE CASE

At page 2 of the Brief for the United States, the government contends that:

> The evidence at trial showed that petitioner, a former Tennessee state senator, used his influence to assist in the sale of Honeywell computers to state and local governments in exchange for payments in excess of $150,000.

This statement is incorrect. The evidence at trial showed that Gillock had no influence on either the sale to the Tennessee Department of Employment Security or the sale to Shelby County, Tennessee. Although Gillock was a state senator at the time of the sale to the Department, he had no authority to approve or disapprove the sale. He sat on no legislative committee reviewing the sale. He exercised no power to affect the sale one way or another. No witnesses for the government testified that Gillock influenced the sale. On the contrary, David Ewing Jean, Sr., the

purchasing agent for the State, testified Gillock did not influence the contract in any way. At most, Gillock knew how Tennessee state government was structured and was more familiar with the purchasing process than a layman unacquainted with Tennessee govern-

ment.

At page 3 of the Brief for the United States, the government contends:

> Petitioner agreed with his co-defendants and Camarda to use his influence to convince the county to purchase an upgraded Honeywell computer system.

This statement is misleading. In the sale to Shelby County, again, Gillock exercised no influence. The County Mayor and Horace E. Hall, Administrator of the Shelby County Computer Center, testified that Gillock could not and did not influence the sale. He was not an elected or appointed official in Shelby County government. He exercised no official power to affect the sale one way or another. None of the witnesses for the government testified that Gillock influenced

the sale. In both the sale to the State and the sale to the County, witnesses from the State and County governments and from Honeywell testified that the State and County received full value for their money.

ARGUMENT

1. The misjoinder issue. - At page 4 of the Brief of the United States, the government acknowledges that the question presented in Gillock's petition is identical to the issue presented in United States v. Lane, cert. granted, No. 84-744 (Feb. 19, 1985). Gillock respectfully requests permission to submit a brief on the issue of misjoinder.

At page 5 of the Brief for the United States, the government rejects the argument that Gillock was prejudicially misjoined with co-defendants Bibby and Ayers in light of the reversal of his conspiracy conviction. The government relies upon Schaffer v. United States, 362 U.S. 511, 513-517 (1960), for this argument. Schaffer, however, differs from the case before this Court.

In Schaffer, the indictment in question contained four (4) counts. Count 1

charged two (2) Schaffers and three (3) Stracuzzas with transporting stolen goods from New York to Pennsylvania. Count 2 charged Marco and the Stracuzzas with moving stolen goods from New York to West Virginia. Count 3 charged Karp and the Stracuzzas with moving stolen goods from New York to Massachusetts. Count 4 charged all of the parties with conspiracy to commit the substantive offenses contained in the first three (3) counts. At the close of the government's proof, the trial court dismissed the conspiracy count for a failure of proof. The trial court submitted the substantive counts to the jury on a detailed charge. On appeal, the defendants argued that prejudice existed by reason of the joint trial. The Court of Appeals and the Supreme Court upheld the convictions. Id. at 513-514.

In Schaffer, the Supreme Court addressed the question of "whether, after dismissal of the conspiracy count before

submission of the cases to the jury, a severance should have been ordered under Rule 14 of the Federal Rules of Criminal Procedure." Id. at 514. The Court held that under the circumstances there was no prejudice. According to the majority opinion, the government carefully compartmentalized the proof as to each petitioner; moreover, upon submission to the jury the trial court "meticulously set out separately the evidence as to each of the petitioners and admonished the jury that they were 'not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant.'" Id. at 515.

In the instant case, in contrast, the trial court did not dismiss the conspiracy county against Gillock. Gillock did not have the benefit of a detailed and careful jury charge. In contrast, it is important to note that at the very start of the evidence, counsel for Gillock moved the

Court to require the government to structure its proof so as to avoid this problem but said motion was overruled. After the remand by the Court of Appeals for the requisite Enright finding and the trial court's continued insistence on Gillock's participation in an alleged conspiracy, the Sixth Circuit reversed Gillock's conspiracy conviction. It should be noted that four (4) Justices dissented from the Schaffer opinion and would have reversed the judgments and remanded the causes for new trials. Id. at 518-524.

Misjoinder in the case at bar forced counsel for Gillock to try collateral issues unrelated to any actions on his part. As a result, joinder with Bibby and Ayers was prejudicial to Gillock on all counts. Such misjoinder can only be remedied by reversal of all of Gillock's convictions.

2. The conflict with United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979). - At

pages 5-6 of the Brief for the United States, the government attempts to distinguish Rabbitt from the case before this Court. In Rabbitt, the defendant Missouri state legislator's prosecution for mail fraud rested upon the theory that he defrauded the citizens of Missouri; in the case before this Court, the government argues, petitioner was charged with defrauding Honeywell not the citizens of Tennessee.

This assumption is correct only to a point. Count I, the conspiracy court, charged the three (3) defendants and unnamed co-conspirators with agreeing to defraud Honeywell. (Pet. 16). The Court of Appeals reversed Gillock's conspiracy conviction. Counts II - IX charged the defendants with violating the mail and wire fraud statutes through a scheme to defraud Honeywell, the State and its citizens, and the County and its citizens. (Pet. 17-19).

The Rabbitt case tested the extent to which the government could use the mail fraud statute to prosecute a public official for fraud. Because there was no evidence in the Rabbitt case to the effect that the defendant's actions in assisting the architectural firm resulted in inferior work, greater expense or tangible loss to the state or its citizens, the Eighth Circuit reversed his convictions on the Berger-Field mail fraud counts.

The Sixth Circuit should have reversed all of Gillock's mail and wire fraud convictions. The Court of Appeals determined that the main conspiracy in this case was the conspiracy to defraud Honeywell of the honest, faithful and loyal performance of its employees. The core of this conspiracy was the arrangement between Bibby, Ayers, and Camarda to split profits. (Pet. App. 10-11). The Court further determined:

The record does not show

> any evidence that Gillock ever knew about the profit-splitting agreement between Camarda, Bibby and Ayers.

(Pet. App. 11). The Court reversed Gillock's conspiracy conviction and one wire fraud conviction but let the remaining convictions stand. Not only is this decision internally inconsistent, but it also conflicts with the Eighth Circuit's ruling in Rabbitt.

At pages 6-7 of the Brief for the United States, the government further attempts to distinguish the holding in Rabbitt from the holding in the case before this Court with respect to alleged Hobbs Act violations. According to the government, in Rabbitt the extorted party did not possess a reasonable belief in the Missouri state legislator's powers. In the instant case, however, Gillock's actions were allegedly sufficient to create a reasonable belief that he could influence the Shelby County sale.

Comparison of the two decisions, however, negates the government's attempt to distinguish Rabbitt from Gillock. According to the Rabbitt opinion, "[t]he principals of the Berger-Field firm testified they sought Rabbitt's political influence as a legislator." 583 F.2d at 1021. At the same time, the record lacked substantial evidence of fear of economic injury to the architects in Rabbitt. The firm did not believe that contracts could not be acquired without Rabbitt's help. Similarly, in the case before this Court, Honeywell had secured contracts in Tennessee without Gillock's intervention. For example, in 1975, Shelby County purchased and installed a Honeywell computer system. (Pet. 15). The prosecution against Gillock resulted from the 1978 purchase from Honeywell to update the system.

The factual background in the Rabbitt and Gillock cases are, in all material respects, identical. The results

achieved, however, are opposite. District Courts, not only in the Sixth and Eighth Circuits but also throughout the country, need clarification and instructions from the Supreme Court on the application of the mail and wire fraud statutes and the Hobbs Act in the prosecution of public officials.

3. Erroneous admission of alleged co-conspirator statements. - With reference to the admission of co-conspirators' evidence not being erroneous because the Court of Appeals found multiple conspiracies (Pet. App. 13) is to overlook and ignore the fact that Gillock was charged with one conspiracy and one only.

A defendant has to be charged with an offense in order for evidence of any kind to be admitted. For the appellate court to hold that Gillock's conviction of the conspiracy charge must be reversed and at the same time say it was proper to allow the alleged co-conspirators' testimony as evidence because that Court had itself found

evidence of conspiracy not charged should not require any legal citation.

Respectfully submitted,

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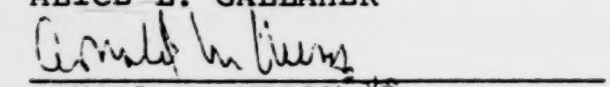
BY: 
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August, 1985

CERTIFICATE OF SERVICE

I, Arnold M. Weiss, Attorney for Petitioner, hereby certify that I have this 1 day of August, 1985, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon The Honorable W. Hickman Ewing, United States Attorney, Federal Building Memphis, Tennessee 38103; Mr. Henry L. Klein, Attorney for Allen Bibby, 770 Estate, Memphis, Tennessee 38119; Mr. Andrew Ekonomou, Attorney for A. Arthur Ayers, Suite 515, Rhodes-Haverty Bldg., 134 Peachtree Street, N.W., Atlanta, Georgia 30303; and Mr. John Hehman, Clerk, United States Court of Appeals for the Sixth Circuit, U.S. Post Office and Courthouse Building, Cincinnati, Ohio 45202; Solicitor General, Department of Justice, Washington, D. C. 20530; The Honorable Robert M. McRae, Judge, United States District Court for the Western District of Tennessee 38103; copies of the foregoing Petitioner's Reply to Brief of the

United States, filed by Edgar Hardin Gillock by placing copies of the same in the United States mail, properly addressed, and with sufficient postage affixed thereto.

Arnold M. Weiss